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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35305

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION –
PETITION FOR A DECLARATORY ORDER**

REPLY COMMENTS OF AMERICAN PUBLIC POWER ASSOCIATION, EDISON ELECTRIC INSTITUTE, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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Due and Dated: April 30, 2010

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Introduction and Summary

American Public Power Association ("APPA"), the association of public power electric utilities, Edison Electric Institute ("EEI"), the association of investor-owned electric utilities, and National Rural Electric Cooperative Association ("NRECA"), the association of consumer-owned electric power systems, hereby submit their Reply Comments.

APPA, EEI, and NRECA are aware of the opening Comments filed herein, and the disagreements between BNSF and the various shipper parties. Rather than review herein every issue raised by every party, some of which can only be discussed in Highly Confidential filings, APPA, EEI, and NRECA believe it would be more helpful to the Board to submit their Reply Comments in this public form to stress the key points that may assist the Board in resolving the main issues in this proceeding, to permit the Board to rule without having to resolve every factual dispute herein. We urge this approach on the Board because of the unprecedented nature of BNSF's Tariff No. 6041-B ("Tariff"), the novel legal and factual issues surrounding it that have arisen, and because BNSF

sought to impose its Tariff without adequate research regarding the nature of the coal dust issue or the efficacy (or lack thereof) of spraying PRB coal to control dust.

We also urge the Board to reject Union Pacific Railroad Company's argument that the Board should not reject BNSF's "emission limits" because of the alleged "chilling effect" that doing so supposedly would have on other steps that UP has taken, in its tariffs, to deal with other sorts of issues. Not only are those other matters not before the Board in this proceeding, but also BNSF has made this proceeding complicated enough without the Board taking on consideration of other issues not before it here. Instead, we agree with the Board (Decision served Dec. 1, 2009 at 3) that the issues herein are "factually intense" and with Norfolk Southern Railway Company (at 1-4) that issues such as those presented in this proceeding should be decided on a "case by case" basis, precisely because they are fact-specific in nature.[1]

Shippers and coal producers have been willing to cooperate with low-cost, sensible efforts to reduce dust, such as through profiling and size requirements. Various estimates suggest that such efforts reduce the amount of dust by 70% or more. We are informed that BNSF concluded that 10-15% of the coal trains are responsible for 90% of

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[1] As APPA, EEI, and NRECA discussed in our Initial Comments (at 6, 8), in proceedings involving radioactive materials, the ICC was presented with various efforts by the railroads to shift their common carrier obligations to the shippers, or avoid their common carrier obligations altogether, by unreasonable terms published unilaterally by railroads in their tariffs. The ICC uniformly rejected those efforts because they were a violation of the railroads' common carrier obligations. *See also, Liability for Contaminated Covered Hopper Cars (Illinois Central Railroad Company)*, ICC I&S Docket No. 9275, 10 I.C.C. 2d 154, 1994 ICC LEXIS 187, at *12-*30 (1994) (holding that railroad may not shift liability in the event of damages due to contamination in railcars where railroad was required to inspect and clean (if need be) railcar before loading grain into it).

the coal dust, which supports the conclusion that sensible measures such as these will solve any coal-dust problem.

Therefore, it is clear that BNSF jumped to the conclusion that it should publish its "emission limits" in its Tariff before having a complete understanding of the problem and before its own requirements were worked out. BNSF changed its coal-profiling requirements; it would not share its data with customers; it created its own secret and unexplained methodology for how its "emission limits" are calculated; and it simply has not dealt openly with its customers, or for that matter, the Board, to solve whatever problem there may be. By publishing a tariff, BNSF imposed requirements, rather than seek to adopt mutually agreed-upon solutions, to the purported problem of coal dust.

Coal shippers are frustrated because the railroads tell them how they must build and load their rail cars. Coal shippers, of course, have until this point complied with these requirements.[2] What then happens to the shippers' coal while it is in the custody of the railroads is the railroads' responsibility, not that of the shippers. The railroads' argument that the loss of coal from the railcars is the shippers' responsibility is, in the circumstances, without any basis in fact or law. It is as if a trucker were to pick up a load of soil to deliver to a customer, and some of the soil were to escape onto the highway; it is not the responsibility of the homeowner to clean up the highway if some soil escapes, but might be that of the trucker. Here, if coal escapes due to rough track, or a derailment, is it the responsibility of the shipper to remove it? No, of course not.

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[2] We do not intend the implication that coal shippers would comply with any requirement purportedly imposed by a railroad on the design, construction, or loading of coal cars, however unreasonable. We leave such disputes, if any, to another day.

Under AAR Rules, there is a process for changes to railcar construction, and in the PRB, there is a process for loading of coal cars. Customers, producers, and railroads are fully capable of airing their views and attempting to resolve them. That is the process that should have been followed to deal with coal dust, rather than to have BNSF make a unilateral (and perhaps arbitrary) determination of what amount of coal dust it believes is the appropriate maximum that should be "emitted," regardless of the cause of the "emission," whether the "emission limits" were established objectively or on the basis of "cherry-picked" data, whether pre-existing dust interferes with the measurement of the dust from a given train, and whether or not the devices used for the measurement are accurate.

Coal shippers believe that the evidence does not support BNSF's claim that coal dust caused the 2005 derailments on the Joint Line, and believe they are being made scapegoats for insufficient track maintenance and inspection by the railroads, as discussed *infra*. Coal shippers are not present on the Joint Line; they are not involved in the loading or transportation of PRB coal; they tender empty rail cars (for some moves, in shipper-provided rail cars; for others, in railroad-provided rail cars) at their power plants; and they have **no** involvement in the transportation of their coal until the loaded cars are delivered to their power plants. (Indeed, railroads typically resist providing information about their systems to shippers.)

For these reasons, coal shippers believe that it is unreasonable, and unfair, to require them to bear the entire responsibility for events that occur while coal is being transported by the railroads, especially because the costs that would be imposed on coal

shippers would be greater, perhaps far-greater, expense than the cost of track maintenance.

Therefore, APPA, EEI, and NRECA urge the Board to reject BNSF's Tariff because it appears to be a solution in search of a problem. We now know that the FRA determined that the May 2005 derailments in the PRB were the result of a defective track weld, a track gauge that was too wide, and apparently inadequate track inspection (which should have disclosed the defective weld and the too-wide gauge problem). Other track maintenance deficiencies also contributed to the derailments, as detailed in the Opening Evidence and Argument of Arkansas Electric Cooperative Corporation ("AECC") at pp. 6-15 and in the evidence cited therein.

We know that requiring BNSF to perform the necessary track maintenance will solve the problem, because that is what BNSF did, **after** the May 2005 derailments. Doing so allowed normal transportation on the Joint Line to resume by 2007 or so, after the necessary maintenance was performed, and without any spraying of coal.

Some coal shippers are voluntarily cooperating with BNSF in spraying PRB coal. But there is not a sufficient record that spraying actually works to prevent coal dust from blowing off the cars, especially to accomplish the desired reduction (85%-90%) in coal dust to justify imposing the cost on all coal shippers. Moreover, coal and coal dust comes out of the bottom of coal cars, not just the top, yet BNSF's Tariff only focuses on the alleged problem with coal dust from the top of the cars. At the same time, BNSF provides some coal shippers with bottom-discharge cars, which are not always maintained as well as they could be, thereby resulting in coal (or coal dust) from coming out of the bottom of coal cars. If BNSF is not willing to impose extraordinary costs on

itself to prevent coal from escaping from coal cars it supplies, it should not be allowed to impose such costs on rail shippers, especially because coal shippers' rates already include provision for maintenance expenses.

Spraying coal, even if it were effective in controlling "emissions" of dust, would cost approximately $0.25/ton, or over $100 million annually, whereas BNSF's costs of maintenance are about $0.05/ton, according to the STB's own data in coal rate cases. Therefore, it is wasteful and unnecessary to require spraying; it is more economical and more efficient to simply require BNSF to perform the necessary track maintenance on the Joint Line and Black Hills Subdivision. Doing so will eliminate the need to resolve issues about whether BNSF is double-billing coal shippers for track maintenance, and whether the coal shippers should be reimbursed for the expense of spraying.

As APPA, EEI, and NRECA stated in their Initial Comments, we do not oppose voluntary efforts on the part of coal shippers, producers, and railroads to spray coal. Based on this record, we merely oppose allowing BNSF to unilaterally impose its untested, unexplained "emission limits" in its Tariff, and request that the requirements of Items 100 and 101 in BNSF's Tariff be determined to be an "unreasonable practice" within the meaning of 49 U.S.C. §§ 10702 and 11101.

Argument

1. <u>According to FRA, the 2005 UP and BNSF Derailments Were Caused by a Defective Weld or Inadequate Maintenance, as Well as Inadequate Track Inspection</u>. The evidence presented by Western Coal Traffic League, et al. ("WCTL") (see WCTL Opening Comments, Appendix B) demonstrates that FRA concluded in a formal report that the reasons for the derailments that occurred in May 2005 within several miles of

each other along the "Joint Line" in the Powder River Basin were (in one instance) a defective weld, and in another instance, a non-conforming wide-gauge track. One or both of these derailments apparently were exacerbated by inadequate track inspections.[3] Had BNSF simply performed the appropriate maintenance **before** the May 2005 derailments, rather than **after**, or conducted the necessary track inspections **before** the derailments, rather than **after**, the derailments most likely would not have occurred.[4]

Therefore, notwithstanding BNSF's and UP's arguments, there is not convincing evidence that the apparently unusual circumstances surrounding the 2005 derailments now justify an unprecedented requirement that shippers be required, in BNSF's Tariff, to comply with "emission limits" that BNSF has proposed but the government (especially FRA) has not approved, despite BNSF's claim that its "emission limits" are a safety-related limitation.[5]

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[3] *See also,* the evidence presented by AECC. Interestingly, one of AECC's experts, Mr. Michael Nelson, identified specific maintenance deficiencies that contributed directly to both of the May 2005 derailments. If proper maintenance and track inspections had been performed before the derailments, the derailments would not have occurred.

[4] The National Coal Transportation Association's study, entitled "Review of Ballast Fouling on the PRB Joint Line," dated February 26, 2007 (slide 17 of 18, entitled "Conclusions"), stated, "It appears that the goal of the BNSF study was to justify spraying to divert attention from its past lapses in track maintenance." NCTA is not an advocacy group, so its conclusion is especially significant.

[5] As set out in our Initial Comments, FRA, not the STB, has authority to promulgate safety standards for railroad operations. However, given (a) FRA's conclusions in its formal Reports about the 2005 derailments, and (b) given that FRA filed a Notice of Intent to Participate in this proceeding but then did not file initial Comments herein, APPA, EEI, and NRECA conclude that FRA does not believe that it is necessary on safety grounds to impose emission limits on coal shippers along the Joint Line or on the Black Hills Subdivision. Rather, FRA concluded that the derailments were due to a defective weld, an improper track gauge, and apparently inadequate track inspections, all of which are manifestations of a failure of the railroad – here, BNSF (although UP is also a joint owner of the Joint Line) – to perform the minimum necessary maintenance and inspections necessary for routine railroad operations. That is a matter for the STB, not

Whatever the motives of BNSF with respect to the lack of adequate track maintenance in the years leading up to the 2005 derailments – years when ever-increasing amounts of PRB coal were being moved, while track capacity increases were not being installed as quickly as demand for transportation justified – the fact remains that the derailments occurred either because BNSF overlooked defective track welds, performed inadequate maintenance of the track, or both. The solution was and is, obviously, to perform adequate maintenance and better track inspections, which APPA, EEI, and NRECA assume BNSF and UP are now doing, as a result of the "lessons learned" from those derailments. There should be no reason why the circumstances that produced the 2005 derailments should recur.

2. Based on BNSF's Response to the Derailments, It Is Evident That There Was Inadequate Maintenance on the Joint Line Prior to the 2005 Derailments. Without going into detail about information under protective order, it also appears that other parties (such as AECC and WCTL) have shown through use of the FRA Reports and other evidence that there was inadequate maintenance performed on the Joint Line and Black Hills Subdivision before the 2005 derailments occurred. It is clear from BNSF's actions that its response to the derailments was to do substantial maintenance to undercut the lines and perform maintenance that apparently was not adequately performed for some period of years before the derailments. It was the responsibility of BNSF and UP to

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FRA. As discussed *infra,* APPA, EEI, and NRECA believe that routine track maintenance – referred to as "maintenance of way" ("MOW") in STB decisions – is entirely adequate to maintain the track used to transport coal trains. After all, BNSF has presented visual evidence in its Opening Comments of the maintenance work it did to repair the Joint Line following the May 2005 derailments, and stated that its maintenance solved the problem. Accordingly, it no longer appears necessary to refer the issue of BNSF's "emission limits" to FRA, as we suggested in our Initial Comments, because the problem presented here may be resolved without resorting to BNSF's "emission limits."

maintain the tracks that they own, and in retrospect, there would have been less disruption if they had done the requisite maintenance all along.[6]

Anyone who has crossed a rail line knows that railroad rights-of-way have experienced the accumulation of materials from a wide variety of sources, not just dust from open-top coal cars, since the beginning of railroads. As a result, and as other parties have shown at great length, especially experts whose testimonies were presented by

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[6] APPA, EEI, and NRECA emphatically reject UP's argument (Opening Evidence and Argument of UP at 9) that it is not capable of continuing to perform the amount of "undercutting" necessary to "remove all coal dust" on its system. UP erects a straw man with its claim that it is necessary to "remove all coal dust;" railroads have not maintained their track rights-of-way to "remove all" contaminants at any time in the history of railroading. It is simply necessary to perform regular maintenance to preserve stable tracks and track beds. It is the duty of UP and BNSF, as rail common and contract carriers with a responsibility to provide service on reasonable request, to maintain their systems adequately and safely, just as it is the duty of other utilities to maintain their systems in service to the public.

To bolster UP's argument that the Board should not find BNSF's Rules unreasonable because UP believes such a finding would interfere with UP's ability to work with customers on dust prevention measures, UP added an example (at p. 21 of its March 16, 2010 Opening Evidence and Argument) of rail maintenance requirements that it professes were developed in consultation with its customers. As the Board is aware, many electric utilities and other coal customers have purchased or leased large fleets of railcars; while this practice may result in a slight rate reduction, railroads have benefited from shippers owning railcars by shifting the cost and responsibility of fleet management such as securing railcars, paying for storage, and maintenance of the railcars to the shippers.

However, this proceeding is not about wheel maintenance or UP's tariff and the Board should not let the railroad arguments about an alleged "chilling effect" on the railroads' ability to provide safe, reliable and efficient rail transportation be used to support broad conclusions about the railroads' authority to impose new costs, duties, responsibilities, or liabilities on shippers. In fact, such new requirements are not usually part of a true collaborative process but instead are introduced and then imposed as a requirement to do business with the railroad. Therefore, in the course of resolving the issues raised under BNSF's Tariff 6041-B, the Board should not make any broad statements that could be used by the railroads to impose new mandates or cost-shifting practices on shippers. Instead, the Board should continue to review the railroads' practices, and determine if they are reasonable or unreasonable, on a case-by-case basis.

AECC and WCTL, railroads must routinely perform track maintenance. Of course, coal dust can be part of the accumulated materials in railroad track beds, but it is only one of several types of materials that build up there, along with other natural and unnatural dust, deteriorated ballast, locomotive sand, grease and oil, water (and other types of precipitation), as well as a variety of other types of materials. Accordingly, railroads must routinely, and should regularly, perform track maintenance, including undercutting the ballast to remove such accumulated foreign materials to ensure and to restore the stability of the track beds. As discussed above, BNSF could hardly dispute that, because its Opening Evidence and Argument show that is exactly what it did in response to the May 2005 derailments.

3. Clearly, Some Track Locations Require More Maintenance Than Other Locations. Also, there can be particular sections of railroad track beds that require more frequent maintenance, given topography or other special conditions. AECC's expert Mr. Michael Nelson showed, for example, that the locations of the two derailments were places where specific maintenance needs had been identified by BNSF, but the required maintenance activities had not been performed. The failure to do so apparently was a direct contributing factor to the 2005 derailments.

4. Spraying of Coal Would Be More Expensive Than Doing Routine Maintenance; Maintenance Must Be Done in Any Event. BNSF has not presented any evidence as to what its maintenance costs would be, as compared to the costs of spraying, so that the STB and coal shippers could determine if BNSF's approach is cost-effective or not, according to BNSF's own data. Accordingly, APPA, EEI, and NRECA have developed the best evidence that they could to permit that comparison; WCTL performed

its own comparison in its Highly Confidential Opening Evidence and Argument, to which we refer the Board without reciting such evidence in this public filing.

Based on the estimated costs in the trade press and from coal shippers of $0.25/ton per year to spray,[7] and, based on public records of STB coal rate proceedings, to be the far-lower per-ton costs of doing track maintenance,[8] and the fact that BNSF and UP will have to do track maintenance in any event,[9] the "emission limits" in BNSF's

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[7] Various coal shippers presented ranges of such spraying costs which are consistent with our estimate of $0.25/ton. *See, e.g.*, Opening Statement of TUCO, Inc. (at 4), stating that it had seen estimates of $$0.10-0.30/ton.

[8] In recent coal rate cases in which the STB has prescribed a maximum reasonable rate as an "R/VC ratio" (such as *Kansas City Power & Light Co. v. UP*, STB Docket No. 42095, *Western Fuels, Inc. v. BNSF*, STB Docket No. 42088, and *Oklahoma Gas and Electric Co. v. UP*, STB Docket No. 42097), the STB did not publish the components of the variable-cost analysis that it may have used to arrive at its decisions. Accordingly, recent decisions do not clearly set out the STB's computation of track-maintenance costs for coal-carrying lines. However, in a series of proceedings a few years ago, *e.g.*, *Public Service Company of Colorado (d/b/a Xcel Energy) v. The Burlington Northern And Santa Fe Railway Company* (served June 8, 2004), STB Docket No. 42057, slip op. at 134, Tables E-7 and E-8; *Texas Municipal Power Agency v. Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42056 (served March 24, 2003) slip op. at p. 54, Appendix A, Tables A-10 and A-11, and *Wisconsin Power & Light Co. v. Union Pacific R.R.*, STB Docket No. 42051 (served May 14, 2002, slip op. at p. 6, Table A-7 (revised), and at p. 11, Table A-6), the STB published disaggregated variable cost findings. These decisions consistently showed variable MOW costs that (adjusted for today's dollars) to be less than the value EEI provided in its Initial Comments ($0.05/ton). *Id.* Using as an example the estimated 81-mile section of the Joint Line from the Black Thunder Mine to the UP line at Shawnee Junction, Joint Line MOW costs would be approximately $0.039-0.044/ton: $76.85/gross ton-mile MOW expense/car from Revised Table A-7 in Decision in *Wisconsin Power & Light Co., supra*, STB Docket No. 420151 (served May 9, 2002))/((111.9 net tons/car from Table A-2 in Decision in the same Docket served September 13, 2001) x (1270.24 loaded miles from Table A-2 in Decision in the same Docket served September 13, 2001)) = $0.00054/net ton-mile. $0.00054/net ton-mile x 81 miles= $0.44/ton. *Id.* Accordingly, our MOW cost estimate of $0.05/ton was reasonable, and appropriate for comparison to the much-higher per-ton costs for spraying provided by the various shipper parties herein.

[9] Neither BNSF nor UP claim in their Opening Comments that spraying of coal will eliminate the need to perform maintenance of their coal-hauling lines. While it is possible to read their Opening Comments to suggest that coal spraying would reduce the

Tariff are an "unreasonable practice" under 49 U.S.C. §§ 10702 and 11101, because the Tariff in effect imposes wasteful, inefficient, and unnecessary expenses on coal shippers.

This is especially true because the structure of BNSF's Tariff is to impose the wasteful, excessive, and unnecessary costs on coal shippers, rather than on BNSF, and then to not even provide coal shippers with a credit for the spraying costs incurred. As a result, BNSF's MOW costs (which are presumably included in BNSF's coal rates on a system-average basis) would be reduced by some significant amount BNSF did not produce, whereas coal shippers' costs would increase, over and above the amount already included in their rates, by an even greater amount than BNSF's MOW costs. Coal shippers would, therefore, pay more than twice for required maintenance, yet not achieve any benefit from spraying.[10]

5. In Any Event, Coal Shippers Should Not Be Required to Take Actions That Have Not Been Shown to Solve the Claimed Problem. Without disclosing the information submitted herein under protective order, the evidence (*see, e.g.*, that introduced by NCTA, WCTL, and others) shows that spraying of coal may not achieve the reduction of 85-90% in emissions of coal dust that BNSF apparently assumed. Shippers should not be required to take actions – spraying of coal - that have not yet been

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need to do such maintenance, neither BNSF nor UP produced a study in their Opening Comments to show that coal spraying is less expensive than performing MOW that may be associated with coal dust.

[10] This analysis does not take into account whatever penalty BNSF may have in mind for failure to "comply" with its "emission limits." In addition, coal shippers might be threatened with the loss of use of their coal car(s) and with the lack of coal caused by a failure to deliver. While at present coal stockpiles have been adequate, there have been at least three periods during the last 15 or so years when that was not so (*i.e.*, following the UP-SP merger, following the Conrail acquisition, and during 2005-06, as a result of the PRB derailments and a strong export coal market), due to inadequate rail service.

shown to accomplish the intended result (dramatically reduced coal dust). To require shippers to incur such expenditures is wasteful and unnecessary, and therefore unlawful. *E.g., Trainload Rates on Radioactive Materials*, 362 I.C.C. 756 (1980), *aff'd sub nom. Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir.), *cert. denied*, 454 U.S. 1047 (1981).

6. There Are Too Many Unknowns with Respect to BNSF's Requirements. There are too many unknowns and uncertainties about BNSF's "emission limits," devices to measure coal dust, and implementation of the "emission limits." The emission limits are different on different portions of BNSF's system; they are based on undefined "units;" the significance of picking 300 units vs. 245 units is unclear; and the limits are intended to measure coal dust but (apparently) not locomotive emissions and other types of dust (such as naturally occurring dust). Moreover, there are numerous questions about the locations of BNSF's measurement devices, and the accuracy of such devices.

7. BNSF's Tariff and Filings Herein Have Not Informed Coal Shippers or the STB What BNSF Will Do If a Coal Car's "Emissions" Exceed BNSF's "Emission Limitations." It is not clear what BNSF will do if a coal shipper's coal cars allegedly exceed BNSF's "emission limits." Even UP candidly stated that it does not know what, if anything BNSF will do if a UP train exceeded BNSF's emission limits; UP says it would object and immediately seek relief if BNSF were to attempt to stop a UP coal train from moving. But coal shippers, UP, and the STB should not be left unclear as to what BNSF will do to "enforce" its own standards; it is unreasonable by definition for a railroad to publish such an incomplete Tariff.

8. BNSF's Argument That the Coal That May Be "Emitted" Is the Shippers' Property and That BNSF Is Not Required to Allow Shippers to Deposit Their Property on BNSF's Rights-of-Way Is Another Variation on UP's Discredited "Trespass" Theory.

BNSF argues that coal dust on its tracks is the shippers' property, and no other shipper is allowed to leave its property on BNSF's rights-of-way, so neither should coal shippers be allowed to do so.[11] This argument is a variation on the discredited affirmative defense for "trespass," interposed by UP in breach-of-contract actions brought against it by certain coal shippers in 2005 and thereafter, for failure of UP to deliver the coal it had committed to transport. The Court in which the "trespass" defense was raised rejected it summarily,[12] and so should the Board. There is simply no basis for arguing that incidental dust, which may result from how a coal car was loaded at a coal mine, or from the operations of the railroad, and which blows off a rail car while the car is under the control of the railroad (whether it be BNSF or UP), is somehow a shipper's (or all shippers') responsibility. The shipper's purported "ownership" of the coal, even if correct (and it would appear that the coal may constitute "abandoned property" if only an incidental amount, not the loss of a substantial amount during a derailment or accident, is involved) does not mean that the shipper is legally at fault for the coal dust ending up along the right-of-way, absent specific proof of a particular shipper's negligence.

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[11] "The coal dust falling onto the railroad right of way and fouling the railroad ballast belongs to the coal shippers who take ownership of their coal at PRB coal mines. The coal is the shippers' freight and therefore it is their responsibility to keep their coal in the loaded railcars." BNSF Opening Evidence and Argument at p. 5.

[12] *Union Pacific R.R. v. Entergy Arkansas, Inc., et al.*, Case No. CV2006-2711, Circuit Court of Pulaski County, Arkansas, Sixth Division, unpublished decision granting partial summary judgment to Entergy Arkansas, Inc., et al., and against UP, filed September 12, 2007.

Conclusion

It has not been shown that spraying coal is less expensive than simply doing necessary maintenance, nor has it been shown that spraying would eliminate the need for any significant amount of track maintenance.

Therefore, the solution to the presence of coal dust along the Joint Line and the Black Hills Subdivision is not to impose unprecedented obligations to comply with "emission limits" that are unproven and that have not been shown to be based on objective data, using devices whose locations and accuracy have not been shown to be appropriate and which may measure other emissions (such as locomotive emissions and other dust) in addition to coal dust from a given train, and that have not been shown to reduce the need for track maintenance by an amount that would justify their costs.

Accordingly, APPA, EEI, and NRECA urge the STB to find that BNSF has not justified the extraordinary (but implicit) new obligation its Tariff would impose on coal shippers to spray their coal, and to conclude that BNSF's "emission limits" in its Tariff are, therefore, an unreasonable practice within the meaning of 49 U.S.C. §§ 10702 and 11101.

For the reasons stated herein, APPA, EEI, and NRECA urge the Board to (1) assert its authority over the lawfulness of BNSF's Tariff, and (2) given FRA's determinations about the causes of the 2005 derailments and the lack of evidence that spraying coal would be cheaper or more efficient than simply performing routine maintenance of railroad track beds, conclude that BNSF's "emission limits" and the implicit requirement to spray coal before it can be transported on BNSF's Joint Line and

Black Hills Subdivision constitute an "unreasonable practice" within the meaning of 49 U.S.C. §§ 10702 and 11101.

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April 30, 2010

Certificate of Service

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